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Collateral Estoppel: Third Department Abandons Unity Requirement

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merely a legislative enactment intended to regulate practice and procedure in the courts. It is submitted that the legislative rule-making power is constitutionally valid under article VI, section 30, of the New York State Constitution.

Collateral Estoppel: Third department abandons unity requirement.

In *Albero v. State*,⁹⁰ plaintiff brought suit in the Court of Claims for personal injuries allegedly suffered due to the state's negligence in maintaining highways. The state made a motion to dismiss under CPLR 3211(a) on the grounds that there existed a judgment against the plaintiff for his negligence in the same accident upon which his claim was based.

In the prior federal court action, Albero was the defendant and the plaintiffs were the driver and passengers who were hit by Albero's auto when it jumped the divider on a state highway. In that action, it should be noted that Albero was unable to start a third-party action against the state since the Court of Claims has exclusive jurisdiction in determining the liability of the state. It appears from both the Court of Claims and third department opinions that in the federal court action Albero had tried to introduce evidence that it was the state's negligence, and not his, which had been the proximate cause of the accident. However, it was determined by the federal jury that Albero's negligence was the proximate cause of the plaintiffs' injuries.⁹¹

The third department's opinion is in conformity with New York's continuing trend towards liberal use of collateral estoppel.⁹² While *Albero* was decided before *Schwartz v. Public Administrator*,⁹³ it appears that the *Albero* decision meets the requirements for the use of collateral estoppel as set down by *Schwartz*. Specifically, there must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, secondly, there must have been a full and fair opportunity to contest the decision now said to be controlling. In applying these standards, it would appear that Albero had the opportunity to show his freedom from liability and

⁹⁰ 31 App. Div. 2d 694, 295 N.Y.S.2d 965 (3d Dep't 1969). For the Court of Claims' disposition, see 56 Misc. 2d 235, 289 N.Y.S.2d 14 (Ct. Cl. 1968); see also *The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 335-36 (1968).

⁹¹ Upon the excerpts of the record of the trial in the federal court, the Court of Claims was unable to determine whether or not the evidence offered by Albero was considered by the jury, but it based its decision upon the instructions by the court and the jury verdict. 56 Misc. 2d at 238-39, 289 N.Y.S.2d at 17-18.

⁹² See *Schwartz v. Public Administrator*, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969); *DeWitt Inc. v. Hall*, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967). See also pp. 144-51 *supra*.

⁹³ 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969).

failed. Therefore, in this present action against the state, he was at least contributorily negligent, and should be precluded from maintaining the action.

However, in applying the rules of collateral estoppel to a case such as this one, where perhaps there was some merit to Albero's defense and where Albero could not begin a third-party action in the federal district court, it is questionable whether the decision did *in fact* allow for a full and fair opportunity to oppose the state's contentions. In the federal district court the jury was presented with severely injured plaintiffs and with Albero as the sole defendant. From the decision it appears that those plaintiffs were free from any liability from the beginning and that the only question was as to Albero's negligence. Albero's defense, that it was the negligence of the state which caused the accident, if allowed and accepted by the jury as true, would then give the plaintiffs no recovery, and force them to sue the state by way of an action in the Court of Claims. The state is thereby placed in a superior position, because if the jury accepted Albero's defense, the state would not be collaterally estopped from successfully asserting its freedom from negligence in the Court of Claims, and if the jury did not accept Albero's defense, that finding could subsequently be used against him in the form of collateral estoppel by the state.

The problem of *Albero* is one of fairness and opportunity, and liberal use of collateral estoppel can prove fatal to many in Albero's position. In his dissenting opinion in *Schwartz*, Justice Bergan highlighted the problem of collateral estoppel:

In this vast legal enterprise there are certain injured parties whose litigation position involves a handicap. These parties would, like all other injured persons, be quite certain of recovery could they assert their claims in simple, direct form, unencumbered by other conflicting claims.⁹⁴

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5201: Future rents not subject to attachment.

In *Glassman v. Hyder*,⁹⁵ the Court of Appeals, affirming the judgment of the Appellate Division, First Department,⁹⁶ held that future rents were contingent and therefore not attachable as debts to become due "certainly or upon demand." The Court, in so holding,

⁹⁴ *Id.* at 77, 246 N.E.2d at 732, 298 N.Y.S.2d at 965 (1969).

⁹⁵ 23 N.Y.2d 354, 244 N.E.2d 259, 296 N.Y.S.2d 783 (1968).

⁹⁶ 28 App. Div. 2d 974, 283 N.Y.S.2d 419 (1st Dep't 1967). For a discussion of the appellate division's treatment of *Glassman v. Hyder*, see *The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 140, 165 (1968).